Timberland Packing Corporation *and* Local 479, United Food and Commercial Workers International Union, AFL–CIO. Case 19–CA–7615

April 15, 1982

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 30, 1981, Administrative Law Judge David P. McDonald issued the attached Supplemental Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Timberland Packing Corporation, Lewistown, Montana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2:

"2. Pay to the following employees the amounts owed by its failure to properly fund the health and welfare accounts, together with interest on the accounts owing, to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977); see also *Olympic Medical Corporation*, 250 NLRB 146 (1980): Jay Deming, $120; William Heath, $120; Richard Spence, $120; Mary Swan, $120; Adrian Glidewell, $96.67; Ronald Lipke, $5; George Minder, $25; and Dale Senn, $5."

2. Substitute the following for paragraph 3:

"3. Pay to the following employees the amounts owed by its failure to properly fund the pension account, together with interest on the accounts owing, to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977); see also *Olympic Medical Corporation*, 250 NLRB 146 (1980): Eugene Apple, $1.60; David Caldwell, $2.40; Jay Deming, $424.55; Adrian Glidewell, $385.10; William Heath, $425.35; Ronald Lipke, $3.20; George Minder, $71.60;, Dale Senn, $18; Richard Spence, $431.30; and Mary Swan, $379.95."

3. Delete the last line of "Appendix," page ii, and substitute the following:

"Total Backpay due Adrian J. Glidewell $1795.05"

4. Delete the last full paragraph of "Appendix," page v, and substitute the following:

"The General Counsel also indicated in his brief that the parties had settled the liquidated backpay owed William Heath and Dale J. Senn; however, Respondent did not submit a check at the hearing for the net backpay owed William Heath. The record indicates that William Heath is owed total backpay of $705.60."

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

DAVID P. MCDONALD, Administrative Law Judge: On November 24, 1975, the National Labor Relations Board issued a Decision and Order in this proceeding,[1] in which it found that the Respondent, Timberland Packing Corporation, engaged in unfair labor practices in violation of Section 8(a)(5) of the Act by refusing on or about September 30, 1974, to bargain collectively with Local 479, United Food and Commercial Workers International Union, AFL–CIO,[2] herein called the Union, as the exclusive bargaining representative of all the employees of Respondent. It further found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by the aforesaid refusal to bargain, and thus Re-

[1] In the absence of exceptions thereto, we adopt, *pro forma*, that part of the Administrative Law Judge's recommended Order which requires that sums owed by virtue of Respondent's unlawful failure to properly fund its health and welfare and pension accounts be paid directly to employees. We therefore find merit in General Counsel's exceptions to the Administrative Law Judge's failure to provide that interest, in accordance with the Board's decision in *Florida Steel Corporation*, 231 NLRB 651 (1977), be added to those amounts. Cf. *Merryweather Optical Company*, 240 NLRB 1213 (1979).

We reject Respondent's contention that interest should be computed according to Montana law. Respondent's monetary obligations here arise from the finding that it violated Sec. 8(a)(5) of the National Labor Relations Act, as amended. Thus, the Administrative Law Judge correctly found that Montana law was federally preempted. We also note that the Administrative Law Judge, in his recommended Order, inadvertently credited Ronald Lipke with $2.30 rather than $3.20, and, at p. 5 of the appendix to his Decision, inadvertently recorded the total backpay due Adrian J. Glidewell as $1,195.05 rather than $1,795.05.

In agreement with Respondent we find, based on the record, that during the period October 1978 through May 1980, Respondent paid William Heath $15 each month as its contribution to the health and welfare accounts. Thus, we find that Respondent owes Heath $120 due to its failure to properly fund the health and welfare accounts; not $540 as found by the Administrative Law Judge.

Member Jenkins would compute the interest due in accordance with his dissent in *Olympic Medical Corporation*.

[1] 221 NLRB 728 (1975).

[2] Formerly known as Local 479, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO.

spondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act. The Board's Decision and Order was enforced on March 18, 1977, by the United States Court of Appeals for the Ninth Circuit,[3] and on May 19, 1977, the court entered its Judgment enforcing the Board's Order in its entirety.

The Board's Order directed Respondent to:

> 1. Cease and desist from:
>
> (a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 479, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:
>
> > All employees employed by the Employer at its Lewistown, Montana, operations, excluding office clerical employees, yard employees, guards and supervisors as defined in the Act.
>
> (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.
>
> 2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:
>
> (a) Upon request, bargain in good faith with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

Thereafter, on October 3, 1977, the Board filed its motion to summarily adjudicate Respondent in civil contempt for failing to comply with the above court's Judgment of May 19, 1977. Respondent failed to answer this motion or to move or otherwise appear in connection with such motion. On November 28, 1977, the court found Respondent in civil contempt for disobeying its Judgment, and ordered it to purge itself of such contempt by:

> (a) Fully complying with and obeying the judgment of May 19, 1977, by, upon request, bargaining collectively in good faith with Local 479, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereafter "the Union") as the exclusive representative of the Company's employees in the appropriate unit, and if an understanding is reached, embodying such understanding in a signed agreement.
>
> (b) Proceeding with the officials of the Union to set an initial meeting date, not to exceed 10 days from entry of this order, and thereafter proceeding to bargain upon consecutive days during regular business hours until all contract proposals on mandatory and lawful subjects have been considered and actions taken in relation thereto.
>
> (c) Immediately posting in conspicuous places, including all places where notices to employees customarily are posted, for a period of sixty (60) consecutive days, an appropriate notice, in the form prescribed by the Board, signed by the president of the Company, which states that the Company has been adjudicated in civil contempt of court for disobeying and failing and refusing to comply with the judgment of this court and that it will take the action in purgation ordered by the court, a copy of this order being posted therewith, and by maintaining such notices in clearly legible condition throughout such posting period, and assuring that they are not altered, defaced, or covered by any other material.

On July 9, 1979, the court appointed a Special Master, who subsequently filed his report on January 30, 1980. In part the Master reported:

> At the hearing on January 14, attorneys for the Board and the Company outlined on the record, for the Master's consideration, a proposed settlement agreement. I have examined the terms of the settlement and find that it effectuates the policies of the National Labor Relations Act and the Court's judgments.

After considering the Master's report, the court on February 28, 1970, found

> . . . that the parties have agreed to the settlement embodied in this order and it is therefore hereby ordered as follows:
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> 1. Respondent Timberland Packing Corp., its officers, agents, successors and assigns, shall:
>
> (a) Forthwith execute the collective bargaining agreement (copy attached as Exhibit A to the Report of the Special Master) with Local 479, United Food and Commercial Workers International Union, formerly known as Local 479, Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO;
>
> (b) Make whole employees for any back wages and fringe benefits due under that contract, said amounts, unless agreed upon, to be computed by the Board in a supplemental proceeding, subject to review by this court. . . .

A dispute having arisen over the amount of backpay due under the terms of the Court's Order to employees: Eugene Apple, David L. Caldwell, Roger D. Crosier, Jay M. Deming, Adrian J. Glidewell, Virgil V. Gluth, Jr., William Heath, Matthew M. Herzog, Ronald E. Lipke, George S. Minder, Dale J. Senn, Richard T. Spence, and Mary Swan, the Regional Director for Region 19 of the Board, on August 11, 1980, issued and duly served on the Respondent a backpay specification, which was amended at the hearing, alleging the amounts of backpay due under the Board's Order. Subsequently, the issue as to the amount of backpay was resolved as to:

[3] 550 F.2d 500 (9th Cir. 1977), cert. denied 434 U.S. 922.

David L. Caldwell, Roger D. Crosier, Virgil V. Gluth, Jr., William Heath, Ronald E. Lipke, George S. Minder, and Dale Senn. On November 20, 1980, Respondent filed a timely answer, which was amended orally at the hearing in the following manner. The statement, "Nothing in the contract obligates Timberland to pay Mary Swan as a meat clerk if she actually works as a meat wrapper, and in any event . . . ." was struck from paragraph 2 of Respondent's answer and the following was added to paragraph 6, "Furthermore, there has been no call for arbitration as required by the Labor Agreement. And finally, the labor agreement as negotiated and executed did not purport to fix the rights of several employees within the categories agreed upon." On December 11 and 12, 1980, I conducted a hearing in this proceeding.

Upon the entire record, from my observation of the demeanor of the witnesses and having considered the post-hearing briefs, I make the following:

I. THE ISSUES

The basic questions to be resolved are whether Respondent owes backpay and Health and Welfare and Pension benefits to and on behalf of its employees listed in the backpay specifications.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the post-hearing briefs, I make the following:

II. FINDINGS AND CONCLUSIONS

A. *Collective-Bargaining Agreement*

On January 14, 1980, the Union and Respondent executed an agreement entitled: *Wholesale Agreement With Timberland Packing*. Unfortunately, due to a series of omissions and ambiguous language, disputes have arisen concerning the classification of various employees and the amount of backpay, which may be due.

The parties agree the employees in question were not members of the Union. Respondent argues the contract only pertains to union members and therefore the case should be dismissed.

It is true the agreement is vague as to who is covered by the contract. The following sections are pertinent in resolving this issue:

> SCOPE OF AGREEMENT
>
> 1. The terms hereof shall govern the wages, hours, and working conditions of employees specified in Appendix "A."
>
> RECOGNITION
>
> Employer recognizes the Union designated above as the sole collective bargaining agent for all employees within the scope of this agreement.
>
> JURISDICTION
>
> This agreement covers the performance of the following work to be done by members of Local Union #479. The cutting, handling, wrapping, processing and preparing of beef, pork, lamb, poultry, rabbits, fish and fish products, all meats, fresh, frozen, chilled or smoked, that is performed on the Employer's premises and which are offered for sale at the Employer's premises.

Although the agreement refers to an Appendix "A" it was never attached to the contract. As a result the document is silent as to the names of the employees intended to be covered in the above "Scope of Agreement." Throughout the contract the phrase "all employees" is frequently used. Respondent urges this phrase should be read in the narrow context of the Jurisdiction section which states, "This agreement covers the performance of the following work to be done by members of Local Union #479." Since the employees were not members of the Union, Timberland reasons that the provisions of the January 14, 1980, collective-bargaining agreement do not cover them. I disagree.

The technical rules of contract law are not necessarily controlling in the field of labor relations. *Pepsi-Cola Bottling Company of Mason City, Iowa*, 251 NLRB 187 (1980); *N.L.R.B.* v. *Donkin's Inn*, 532 F.2d 138, 141–142 (9th Cir. 1976). It is an established and fundamental principle of labor law that labor-management contracts are not to be read with narrow precision. *Local No. 742, United Brotherhood of Carpenters and Joiners of America*, 444 F.2d 895, 902 (D.C. Cir. 1971). In cases of ambiguity it is necessary to look at the circumstances surrounding the drafting of the contract in order to clarify the intent of the parties. In *United Steel Workers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 567 (1960), the Supreme Court held, "We think special heed should be given to the context in which collective-bargaining agreements are negotiated and the purpose which they are intended to serve." Thus the existence of ambiguous contractual language warrants inquiry into relevant bargaining history in order to resolve latent ambiguities; and accordingly, extrinsic evidence regarding full circumstances of negotiations is properly considered to resolve ambiguity. *Gulf Refining and Marketing Co.*, 238 NLRB 129 (1978).

Raymond Trudell, business representative, and Lester Peck, International representative, represented the Union in its collective-bargaining negotiations with Timberland. Robert L. Johnson, an attorney, represented Respondent.

Although Timberland, in its answer and brief alleges that the contract by its terms applies only to union members and persons named therein and defended on the basis that none of the employees named by the Board in its specification were either union members or named in the contract, it admitted that "Timberland may well have assumed the burden of contractual obligations toward them through acquiescence." Respondent readily admits that it accorded all of its employees the privileges specified in the contract and during the hearing it did not contest the Health and Welfare and Pension provisions in the backpay specification as it applied to all employees. By its actions Respondent clearly indicated it believed the contract covered all of its employees.

In his thorough review of the lengthy collective-bargaining negotiations, it was Trudell's opinion that all employees who performed the cutting, wrapping, and the handling process in preparing beef at Timberland Pack-

ing were covered by the contract, regardless of their union membership status. This conclusion was neither denied nor rebutted by Respondent.

The collective bargaining in this case traveled a rather protracted and circuitous route. Respondent ignored the Board's Decision[4] and the enforcement order of the Ninth Circuit,[5] which ordered it to bargain in good faith with the Union. It was not until the Ninth Circuit held Timberland in civil contempt that Respondent began serious negotiations. The ultimate answer as to who was covered by the final contract is found in the Court's civil contempt citation of May 19, 1977, which allowed Respondent to purge itself of such contempt by bargaining in good faith with the Union, as the exclusive representative of the "Company's employees in the appropriate unit . . . ." The appropriate unit had previously been defined by the Board[6] and the Ninth Circuit[7] as:

> *All employees* employed by the Employer at its Lewistown, Montana, operations, excluding office clerical employees, yard employees, guards and supervisors as defined in the Act. [Emphasis supplied.]

On January 30, 1980, the Special Master, appointed by the court, reported that the parties had reached a settlement which, "effectuates the policies of the National Labor Relations Act and the Court's judgments." The court accepted the Master's report and Respondent, by executing the collective-bargaining agreement, purged itself of civil contempt. In order to purge itself of civil contempt it was necessary for Respondent to sign a contract which complied with the court's previous enforcement order,[8] with an appropriate unit that included, "All employees . . . ."

Accordingly, after considering all of the above factors, I find the provisions of the collective-bargaining agreement of January 14, 1980, covered:

> All employees employed by the Employer at its Lewistown, Montana, operations, excluding office clerical employees, yard employees, guards and supervisors as defined in the Act.

The contract provisions covered all the employees listed performing unit work.

B. *Employees*

1. Joe Minder

Joe Minder has been the manager of Timberland Packing since 1973. Each week he devoted 2 to 3 hours buying cattle at the local public auction and occasionally purchased livestock in the surrounding countryside. The balance of his time was spent in supervising, delivery, and cutting meat.

Minder testified that due to Timberland's small size all employees performed whatever work was available, in addition to their primary tasks. For example, everyone including the bookkeeping was occasionally called upon to deliver meat. During a typical period Respondent employed one meatwrapper, three butchers on the kill floor, and two meatcutters. Mary Swan was the meatwrapper; Jay Deming, Richard Spence, and Adrian Glidewell were the butchers; and Bill Heath and Joe Minder were the meatcutters.

Jay Deming had acted as a foreman; however management felt he lacked leadership qualities. Therefore in November 1978, when they had an opportunity to hire a butcher, Minder retained Glidewell as both a butcher and foreman of the kill floor. The record is in dispute as to the facts surrounding this event. Glidewell claims that Minder called him and offered him full-time work as a butcher and meatcutter. Minder's recollection differed in that he stated Glidewell had called him seeking work. It was not until after Glidewell was working that he expressed a desire to learn the art of cutting meat. Minder agreed that Glidewell had some previous experience cutting meat, but he felt that Adrian was still learning. In 1979 Bill Heath became involved in making sausage twice a week and Adrian would take Heath's place cutting meat. Minder testified that Glidewell never complained that he should receive the pay of a meatcutter instead of a butcher.

Since the volume of work was limited and erratic, most employees had secondary duties. For instance, Timberland slaughtered cattle and hogs only 1 to 3 days per week. As a result, the butchers would perform other work on the nonkill days. Deming, Spence, and Glidewell all shared the work of cleanup and delivery of meat. In addition, Deming did some boning, Spence did electrical work and general maintenance, and Glidewell cut meat when Heath was unavailable. In general, all employees were very cooperative in working wherever needed, regardless of their primary job description.

After the contract was signed it was posted for the employees to inspect. No one asked for a copy of the contract, nor did anyone complain to Minder concerning their job classification or hourly wage.

In the fall of 1980, Respondent's business continued to decline. As a result it reduced the schedules of Glidewell, Spence, Swan, and Deming to part time.

2. Mary Swan

Mary Swan testified she was hired by Joe Minder in October 1974 as a meatwrapper. At that time he inquired as to her prior experience. Minder stated he was on vacation when Swan was hired by her brother, Bill Heath. Since he was not present, he denied knowledge of her previous experience.

Mary's previous experience consisted of wrapping precut meat at the Red Owl Store, Bemidji, Minnesota, from 1952 until 1956, and as a meatwrapper for National Food Stores, Minneapolis, from 1958 until 1959.

As a meatwrapper for Respondent, she devoted approximately 95 percent of her time wrapping meat for the freezer. The remainder of her week was consumed by boning, grinding, and servicing the customer meat counter.

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[4] 221 NLRB 728 (1975).
[5] 550 F.2d 500 (9th Cir. 1977).
[6] 221 NLRB 728 (1975).
[7] *N.L.R.B.* v. *Timberland Packing Corporation, supra.*
[8] *Ibid.*

Mary Swan said that on numerous occasions she complained to Minder that she deserved a higher income. However, she never filed a grievance or sought the assistance of the Union. Although she had read the collective-bargaining agreement, she insisted her complaint was not based on the Job Classifications and Wages found therein. She simply felt she was not receiving an honest wage. Other than her displeasure over her wages, she felt her relationship with Timberland was essentially happy.[9]

3. Jay Deming

Jay Deming worked for Respondent as a butcher for 7 years. His previous experience consisted of working as a butcher 10 years for Valley Meat Packing Company and 1 year for Stillwater Packing Company. Minder had been the plant manager for the Hanson family, who owned Valley Meat. He recalled Deming working there as a cleanup boy and later as a butcher.

As a butcher for Respondent, he worked on the kill floor, 1 to 3 days per week, killing the cattle and hogs, removing hides and entrails, and general cleanup. Both Swan and Deming estimated he spent approximately 75 percent of his workweek boning meat.

Deming also admitted he never complained to management concerning his job classification or wages. His complaints to his fellow workers were not based on the wage scale found in the collective-bargaining agreement, but simply on his personal feelings that his income should be higher.[10]

[9] At the conclusion of Swan's testimony, Respondent acknowledged it did owe her backpay in the amount of $2,343.75. After deducting $143.67 for social security and $494.90 for Federal income tax, a check in the amount of $1,705.18 was handed to Swan. This payment did not include interest. The amount of the backpay was based on the number of stipulated hours she had worked and on Respondent's assertion that, "This woman was hired as, and is, a meatwrapper with no significant or recorded experience as a meat clerk prior to March 1, 1978."

DATE	*HOURS*	*PAY*	*BACK-PAY*
Prior to 9/30/78	1,040	104 at $2.75 936 at $3.00 (Contract $3.52)	$79.08 486.72
Prior to 6/30/79	1,040	344 at $3.00 696 at $3.25 (Contract $3.74)	254.56 341.03
Prior to 12/31/79	1,040	622.5 at $3.25 417.5 at $3.55 (Contract $3.96)	441.97 171.17
Prior to 6/1/80	988	$3.55 (Contract $4.40)	569.22 569.22
			$2,343.75

[10] At the conclusion of Deming's testimony Respondent acknowledged it owed him backpay in the amount of $199.35. After deducting Federal income tax, a check in the amount of $162.73 was handed to Deming. This payment did not include interest. Respondent arrived at this backpay based on the view that Deming was a butcher, with the following stipulated hours:

4. Richard Spence

Richard Spence was hired by Joe Minder on March 26, 1976, as a butcher. With a great deal of pride, he described his prior work experience as a real cowboy for 19 years. As an employee for Timberland his primary duties consisted of killing livestock, skinning and gutting, splitting the carcass, and then cleaning the area. He explained they butchered two or three times a week depending on the volume of business. During the remainder of the week he worked as a handyman and boned some meat.[11]

5. Adrian Glidewell

Adrian Glidewell was employed by Timberland on three separate occasions, from 1968 to 1970, 1972 to 1976, and 1978 to 1980. He was initially hired by the former plant manager, Jens Moligaard. From 1970 until 1972 he worked as a meatcutter for Ron's Food Center. Glidewell claimed his second employment was as a butcher with a limited amount of meatcutting. However, during

DATE	*HOURS*	*PAY*	*BACK-PAY*
Prior to 9/30/78	1,040	$4.375—$4.625 (Contract $4.09)	0
Prior to 3/31/79	1,040	$4.625 (Contract $4.36)	0
Prior to 9/30/79	1,040	$4.625—$5.00 (Contract $4.63)	0
Prior to 3/31/80	1,029	$5.00 (Contract $4.91)	0
Prior to 6/30/80	11	$5.00 (Contract $4.91)	0
Prior to 6/30/80	443	$5.00 (Contract $5.45)	$199.35

[11] At the conclusion of Spence's testimony, Respondent acknowledged it owed him $4,012.80 in backpay. He was then presented a check in the amount of $2,707.11 with deductions of $1,305.69 (social security, $24.60 and Federal income tax, $1,281.09). The amount of backpay was based on Respondent's assertion that Spence was employed as a butcher with no previous experience prior to employment with Timberland and the following stipulated work hours:

DATE	*HOURS*	*PAY*	*BACK-PAY*
Prior to 9/30/78	1,040	864 at $3.00 176 at $3.50 (Contract $4.09)	$ 941.76 103.84
Prior to 3/31/79	1,040	$3.50 (Contract $4.36)	894.40
Prior to 9/30/79	1,040	585 at $3.50 456 at $4.00 (Contract $4.63)	659.92 287.28
Prior to 3/31/80	1,040	536 at $4.00 504 at $4.50 (Contract $4.91)	487.76 206.64
Prior to 6/1/80	456	$4.50 (Contract $5.45)	431.20 431.20
			$4,012.80

during this last period he insists that his primary function was that of a meatcutter. Both he and Swan estimated that he devoted 70 to 80 percent of his week cutting meat and "pumping hams and bacon." He testified that he butchered cattle once a week and hogs every other week. Minder did not deny the fact that Glidewell cut meat; however, Minder did deny that he was an accomplished meatcutter and it was not until 1979 that he began to work alone while Heath made sausage. Glidewell claims that during this period he was actually in charge of the meatcutting room. This assertion was based on the fact he was left alone while Heath prepared the sausage.

As a butcher he was paid $5 an hour. He testified that he complained to Minder that he should receive $5.90, the meatcutter's wage. Minder denies that such a request was ever made. Adrian did not file a grievance nor complain to the National Labor Relations Board concerning his wages.

C. *Job Classification and Wages*

Through the years Timberland maintained a relatively small work force. Prior to the execution of the contract most of its employees operated under a very informal and vague job classification. Since the work tended to be sporadic, the employees were called upon to perform a wide variety of tasks beyond their immediate duties. For example, when the butchers were not slaughtering, they cleaned, changed light bulbs, boned, delivered and cut meat, and performed general maintenance. Perhaps Richard Spence, a butcher, provided the clearest insight as to the employer-employee's philosophy of "pitching-in," when he commented, "to make it all simple to you, when Mr. Minder tells me to go out there and wrestle a cow and put him in the feed lot, that's what I do. He tells me to go fix a light switch, that's what I do."

The collective-bargaining agreement provided for the following job classification and wages, effective March 1, 1978:

Meat Cutter			$5.90
Butchers			5.45
Apprentice Butchers			
1st 6 months	0–1040 Hrs.	75%	4.09
2d 6 months	1,041–2080 Hrs.	80%	4.36
3d 6 months	2,081–3120 Hrs.	85%	4.63
4th 6 months	3,121–4160 Hrs.	90%	4.91
Thereafter		100%	5.45
Meat Clerk			4.40
Apprentice Meat Clerk			
1st 6 months	0–1,040 Hrs.	80%	3.52
2d 6 months	1,041–2,080 Hrs.	85%	3.74
3d 6 months	2,081–3,120 Hrs.	90%	3.96
Thereafter		100%	4.40

> Retro-active pay for all employees on the payroll back to 3/1/78 (March 1, 1973) will be paid for all hours worked.

It further provided under the Scope of Agreement that, "The terms hereof shall govern the wages, hours, and working conditions of employees specified in 'Appendix A'." Unfortunately, Appendix A was never attached to the contract and presumably was never drafted. Therefore the agreement is silent as to the starting job and wage classification for each employee. In fact the parties stipulated that throughout the lengthy negotiations there were no indications that this problem was ever discussed. Trudell, as a representative of the Union, negotiated the final job classification and wages. During his testimony he readily admitted that he did not take a position as to where Mary Swan should be placed on the wage scale. Prior to execution of the contract, Trudell agreed, that it was up to the employer to determine when an individual had sufficient training to become a journeyman. Trudell observed that, "The contract is silent as far as prior experience, and therefore it's *voluntary* to whether employees should receive experience rate. That doesn't mean because you are a journeyman today and because you signed a contract, you go back to ground zero. Your past experience always count in the industries." He based this conclusion on his 18 years of union experience. In similar cases he felt that the industry's practice gave employees credit for their experience with other conpanies. However, when the General Counsel asked, "Was this acceptance the employers concerning prior experience on a voluntary [basis] . . . ." Trudell responded, "Yes, sir."

Since a review of the history of negotiation and inspection of various notes, letters and other documents does not shed light on the intentions of the parties in placing employees on the wage scale, the General Counsel argues that we must then rely on the accepted custom in the industry as outlined in Trudell's testimony. In contrast, it is the contention of Respondent that by failing to include "Appendix A" and by failing to bargain over the job and wage classification of each employee, the ultimate decision for such placement remained in the hands of the Company. The Union could have bargained for advanced standing for any of the employees, based upon experience accumulated prior to the effective date of the contract. This they failed to do. In support of its position Respondent relies on the collective-bargaining agreement, which it insists is not ambiguous:

> SCOPE OF AGREEMENT
>
> 3. It is understood the Employer retains all rights not surrounded herein to manage and control its work force.
>
> 5. Except as herein clearly and explicitly limited by the express terms of this Agreement, the right of the Employer in all aspects to manage its business operations and affairs shall be unimpaired.
>
> CLASSIFICATIONS AND WAGE RATES
>
> 2. For the purposes of determining length of service, wage adjustments, and the placement of employees in the apprenticeship progression for Butchers and Meat Clerks, one hundred and seven-

> ty three [173] hours of employment shall be considered as one [1] month's experience.[12]
>
> 3. The parties recognize and agree that the classifications of Journeyman in the Agreement require skill, knowledge, experience and ability which can only be acquired by training and work on the job in a plant or comparable experience under the direction and supervision of the Employer. Accordingly, provision is made in this Agreement for advancement through apprentice classifications on the basis of actual hours worked for the Employer and apprentices will be promoted upon satisfactory completion of the period of employment training set forth in this agreement.

Therefore, since specific employees were not classified as to their wage and position and since prior experience is not identified as a factor in the classification of employees, Respondent submits that it is free to make those determinations as part of the Employer's rights delineated under paragraphs 3 and 5 of Scope of Agreement.

When a collective-bargaining agreement is not clear and must be supplemented by evidence of industrial practice, its meaning becomes a question of fact. *Arnold* v. *Atlantic & Pacific Tea Co.*, 461 F.Supp. 425 (1978). In *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960), the Supreme Court stated: "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it."

In the present case, Trudell explained that the practice within the packing house industry was to give credit for a worker's past experience when determining the wage and job classification. However, in response to further questions he readily admitted that such credit for a worker's past experience is bestowed on a voluntary basis throughout the industry. Accordingly, I must find that even if the industry did consider past experience, it was done solely on a voluntary basis. Thus Timberland was free to allow credit for the experience or to rely on management's authority as proscribed in the Scope of Agreement, paragraphs 3 and 5, *supra*. It elected to manage and control its business operations and affairs in an unimpaired manner. Thus, it chose to ignore past experience and start the butchers and meat clerk on the first step of the apprenticeship ladder. Such a decision may appear unfair or poor management. However, there is nothing in the contract, the history of the negotiations, or industry practice to preclude such action.

An additional question is raised in regard to Glidewell and Eugene Apple. Were they butchers or meatcutters? Respondent categorized Glidewell as a journeyman-butcher and paid him accordingly. The fact that Glidewell cut meat when he was not butchering, cleaning or delivering is not in dispute. Apparently his meatcutting duties increased in 1979 when Heath began making sausage. Glidewell's and Mary Swan's testimony that 70 to 80 percent of his time was devoted to meatcutting was persuasive and not disputed. In addition I found Respondent's bookkeeper, Bonnie J. Moseman, to be a very credible witness. She testified in a clear and concise manner after carefully listening to the questions. I credit her recollection that Glidewell was hired in November 1978 as the butcher foreman of the kill floor, with the understanding he would be taught how to properly cut meat. When Heath began to make sausage in 1979, the majority of Glidewell's time was devoted to meatcutting. The record is clear that in 1979 Glidewell worked as a butcher and meatcutter. Since he worked the majority of his time as a meatcutter, he should have been classified as a meatcutter. Therefore, in determining the correct backpay due Glidewell, I find he is entitled to receive $5.90 an hour as a meatcutter throughout 1979 and 1980.

Eugene Apple had previously worked for Respondent as a butcher. On November 6 and 7, 1978, he worked for 16 hours boning and cutting meat for $3.50 per hour. He was hired as a butcher, but on the 6th and 7th Timberland did not slaughter. As was true with the other butchers, when they were not slaughtering they performed other tasks. Since he only worked 2 days it is impossible to determine whether in the future the majority of his work would be in the field of butchering or meatcutting. However, I have credited the testimony of Moseman who indicated the company books carried Apple as a butcher. Apple did not testify. After reviewing the entire record I find that although Apple did cut meat for 2 days, he was in fact hired as a butcher.

D. *The Pension and Health and Welfare Accounts*

Respondent admits that its obligation under the health and welfare clause and the pension clause are clear and not in dispute. However, until December 11, 1980, the day preceding this hearing, Timberland had failed to follow the contract concerning these accounts. On December 10, 1980, Resondent set up two bank accounts: the Timberland Interim Retirement Account in the amount of $1,641.25 and the Timberland Health and Welfare Account in the amount of $616.67 at the Northwestern Bank in Lewistown, Montana.

Under the contract, Timberland was required to deposit $20 per month for each employee into individual accounts for a special Health and Welfare Account. Prior to May 1980, the Employer paid $15 directly to each employee. Thus, it not only failed to pay the full amount but it also failed to maintain individual records concerning the contribution. In addition, payments were not made to former employees for the difference between the $20 and $15.

The parties stipulated at the hearing that the original backpay specifications as supplemented by Respondent's bookkeeping records found in General Counsel's Exhibit 10 reflect a true and accurate record of the hours each employee worked from March 1, 1978, to December 11, 1980. The effective date of the health and welfare was October 1, 1978, and of the pension November 1, 1978.

The General Counsel argues that the deposited amount of $616.67 is not sufficient to fully fund the health and welfare account through December 11, 1980. Its computations are based on the $5 difference between the $20

[12] The record indicates that prior to the execution of the contract Timberland did not have an apprenticeship program.

called for under the contract and the $15 paid to each employee from October 1978 through May 1980, plus $20 for December 1980. Accordingly, Respondent owes Deming $120, Heath $540, Spence $120, and Swan $120.

The contract required Respondent to pay employees upon their termination any unused portion of their health and welfare benefits. Accordingly, Respondent owes the following former employees: Glidewell, $91.67; Lipke, $5; George Minder, $25; and Senn, $5.

The General Counsel further argues that the correct contribution by Respondent for the Pension Account is $2,143.05 and not $1,641.25. The $2,143.05 is based upon the stipulated compensable work hours under the contract from November 1, 1978, through December 11, 1980. The contract required Timberland to pay 10 cents for all compensable hours per employee into a special IRA-type retirement account. Accordingly, the following additional sums are owed by Respondent: Apple, $1.60; Caldwell, $2.40; Deming, $424.55; Glidewell, $385.10; Heath, $425.35; Lipke, $3.20; George Minder, $71.60; Senn, $18; Spence, $431.30; and Swan, $379.95.

Upon the foregoing findings and conclusions, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[13]

The Respondent, its officers, agents, successors, and assigns, shall:

1. Pay to each discriminatee the sum set opposite his name on the attached net backpay, marked "Appendix," togother with interest on the amounts owing, to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977); see also *Olympic Medical Corporation*, 250 NLRB 146 (1980). I reject Respondent's contention that any interest rate that would be imposed on the backpay is limited to 6 percent as prescribed by Section 31-1-106 of the Montana Code Annotated. Under these circumstances the Montana Code is federally preempted by the National Labor Relations Act and the Decisions and Orders of the National Labor Relations Board.

2. Pay to the following employees the amounts owed by its failure to properly fund the Health and Welfare Accounts: Jay Deming, $120; William Heath, $540; Richard Spence, $120; Mary Swan, $120; Adrian Glidewell, $91.67; Ronald Lipke, $5; George Minder, $25; and Dale Senn, $5.

3. Pay to the following employees the amounts owed by its failure to properly fund the Pension Account: Eugene Apple, $1.60; David Caldwell, $2.40; Jay Deming, $424.55; Adrian Glidewell, $385.10; William Heath, $425.35; Ronald Lipke, $2.30; George Minder, $71.60; Dale Senn, $18; Richard Spence, $431.30; and Mary Swan, $379.95.

[13] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Computation of Backpay

Mary Swan

TIME	HOURS WORKED	WAGE PAID	CONTRACT WAGE	DIFFERENCE	BACKPAY
Prior to 9-30-78	104	$2.75	$3.52	$ .77	$80.08
	936	3.00	3.52	.50	486.72
Prior to 6-30-79	344	3.00	3.74	.75	254.56
	696	3.25	3.74	.49	341.04
Prior to 12-31-79	622.5	3.25	3.96	.71	441.98
	417.5	3.55	3.96	.41	171.18
1-1 to 3-31-80	455	3.80	4.40	.60	273.00
4-1 to 12-11-80	1,348	3.80	4.40	.60	808.80
Total Backpay					$2,857.36
Backpay paid at hearing					2,343.75
Balance Due Mary Swan					$513.16

Adrian J. Glidewell

TIME	HOURS WORKED	WAGE PAID	CONTRACT WAGE	DIFFERENCE	BACKPAY
10-1-78 to 9-30-78	256	$5.00	$4.91	$—	None
1-1-79 to 6-30-79	706.5	5.00	5.90	.90	635.85
	313.5	5.50	5.90	.40	125.40
7-1-79 to 12-31-79	872	5.50	5.90	.40	348.80
1-1-80 to 6-30-80	912.5	5.50	5.90	.40	365.00
7-1-80 to 11- -80	800	5.50	5.90	.40	320.00
Total Backpay due Adrian J. Glidewell					$2,857.36

Jay M. Deming

TIME	HOURS WORKED	WAGE PAID	CONTRACT WAGE	DIFFERENCE	BACKPAY
Prior to 9-30-78	852	4.375	$4.09	—	None
	360	4.625	4.09	—	None
10-1-78 to 3-31-79	1024	4.625	4.36	—	None
4-1-79 to 9-30-79	792	4.625	4.63	.005	3.96
	239	5.00	4.63	—	None
10-1-79 to 3-31-80	981	5.00	4.91	—	None
4-1-80 to 5-31-80	352	5.00	5.45	.45	158.40
6-1-80 to 12-11-80	1033.5	5.45	5.45	—	None
Total Backpay					$162.36
Backpay paid at hearing					199.35
Balance due Jay M. Deming					None

Richard Spence

TIME	HOURS WORKED	WAGE PAID	CONTRACT WAGE	DIFFERENCE	BACKPAY
Prior to 9-30-78	864	$3.00	$4.09	$1.09	$941.76
	176	3.50	4.09	.59	103.84
Prior to 3-31-79	1040	3.50	4.36	.86	894.40
Prior to 9-30-79	585	3.50	4.63	1.13	661.05
	456	4.00	4.63	.63	287.28
Prior to 3-31-80	536	4.00	4.91	.91	487.76
	504	4.50	4.91	.41	206.64
4-1 to 5-31-80	456	4.50	5.45	.95	433.20
6-1 to 12-11-80	1048.5	5.45	5.45	—	None
Total Backpay					$4,015.93
Backpay paid					4,012.80
Balance Due Richard Spence					$3.13

Eugene Apple

TIME	*HOURS WORKED*	*WAGE PAID*	*CONTRACT WAGE*	*DIFFERENCE*	*BACKPAY*
11-6 and 11-7-78	16	$3.50	$4.09	$.59	$9.44
Total Backpay					$9.44
Paid at hearing					9.44
Balance Due					None

Mr. Apple was not present at the hearing. The Respondent's attorney showed the General Counsel a check made payable to Eugene Apple in the amount of $8.86, which represented $9.44 less deductions for Federal income tax. The $9.44 does not include interest.

The following employees received backpay as agreed upon by the General Counsel and Respondent's attorney. As in the case of Mr. Apple, these individuals were not present and the Respondent's attorney showed checks to the General Counsel and indicated the checks would be mailed to their last known address. The amounts do not include the required interest:

Employee	*Gross Backpay*	*Net Backpay*
Virgil Gluth	$ 3.96	$ 3.72
Roger D. Croiser	331.36	277.25
David Caldwell	55.04	31.67
Ronald Lipke	37.76	35.45
George Minder	330.40	276.35

The General Counsel also indicated in his brief that the parties had settled the liquidated backpay owed William Heath and Dale J. Senn. The record is silent in regard to these two individuals.